IN THE COURT OF APPEALS OF IOWA

No. 3-1157 / 13-0451
Filed January 23, 2014

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JAMES ALAN ROSE,
Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury County, Timothy T. Jarman, District Associate Judge.

A defendant appeals his sentence imposed for operating while intoxicated as a habitual offender. **AFFIRMED.**

Tod Deck of Deck Law, L.L.P., Sioux City, for appellant.

Thomas J. Miller, Attorney General, Jean Pettinger, Assistant Attorney General, Patrick Jennings, County Attorney, and Adam Kenworthy, Student Legal Intern, for appellee.

Considered by Danilson, C.J., and Vaitheswaran and Potterfield, JJ.

DANILSON, C.J.

James Rose appeals his sentence imposed for operating while intoxicated (OWI), fourth offense, as a habitual offender, in violation of Iowa Code sections 321J.2 and 902.8 (2011). He contends the district court failed to provide adequate rationale on the record to allow for review. He contends, in the alternative, even if the record allows for review, the district court abused its discretion by failing to consider testimony on his behalf provided at the sentencing hearing. Finally, he asks that we preserve his claim of ineffective assistance for possible later review. We conclude the district court gave adequate reasons and did not abuse its discretion. We preserve his claim for ineffective assistance, and we affirm the conviction.

I. Background Facts and Proceedings.

On December 8, 2012, Rose was arrested for driving while intoxicated, failure to install an ignition interlock device, and driving while barred. Rose pled guilty to operating while intoxicated, fourth offense, as a habitual offender on February 22, 2013. Following a motion by the State, the district court dismissed the other two charges.

A sentencing hearing took place on March 11, 2013. At the hearing, the State argued Rose should be imprisoned, citing five previous OWI convictions, some following alcohol treatment opportunities that Rose had failed to take full advantage of. The State also noted Rose had failed to install an ignition interlock device and failed to obtain SR-22 insurance, as required. Rose offered seven witnesses, including family members, a coworker, and fellow recovering addicts.

Each testified that Rose had been committed to his recovery for alcohol addiction and inpatient treatment would be more beneficial to Rose than imprisonment.

The court sentenced Rose to a term of incarceration not to exceed fifteen years, with a required minimum of three years before parole eligibility. Explaining its reasoning, the court stated:

> The defendant stands convicted and is guilty of the charge contained in Count I of the trial information in this case which is Operating While Intoxicated, fourth offense, with the habitual offender enhancement. In this situation the court has one of two options: that is to impose the term of incarceration not to exceed 15 years or to suspend all of it and place the defendant on a period of probation.
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> I have to say when someone has reached this status in the criminal justice system to be classified as a habitual offender status, it is rare that the 15-year sentence gets suspended and they're put on probation, but I have done that in a case with this same type of a charge, it wasn't with these facts. It wasn't with the criminal history of Mr. Rose as he has it here. For me to do that, I think there has to be particularly unusual circumstances.
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> Here, Mr. Rose's criminal history goes back decades. He has had numerous chances. It's great that there are people here supporting him today and asking that he be given a second chance, but in fact we're way past the second chance. We're way past the third chance or the fourth chance or the fifth chance. Mr. Rose has had many, many, many opportunities to change his ways.
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> And, I understand and appreciate the situation with addicts and relapses, but this isn't just a relapse. This is a relapse accompanied by getting behind the wheel of a car, and that is essentially putting the public in serious harm's way.
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> If this were a situation where Mr. Rose relapsed and was found passed out in an alley and he was in front of me on an aggravated misdemeanor charge of multiple prior public intoxications, then we could be just talking about it being a relapse situation. But when you put yourself in the wheel of a deadly weapon, which is what a motor vehicle becomes when it's operated by someone intoxicated, then we're beyond just saying it was a relapse. It was much worse than that.
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> And in light of Mr. Rose's numerous earlier opportunities, including what I have been led to believe is an excellent treatment program, the Project Phoenix program, which he went through, both the inpatient and outpatient portions of it, and it apparently

> helped him for a while. It apparently didn't help him enough or he didn't help himself enough, and he continued to make bad decisions, including a relapse a few years ago that, fortunately, didn't involve a motor vehicle operation, but then this situation occurred.
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> In light of all that, I believe that I should not, and I am not, going to suspend the 15-year prison sentence in this case. Since those are my only two options, I believe in this situation the defendant needs to receive the term of incarceration.

In the written ruling and order, the court further stated, "Numerous individuals testified on behalf of the defendant, and the court also considered the exhibits introduced on behalf of the defendant. It is impressive that the defendant has so many friends and supporters. Unfortunately, his criminal history speaks with a louder voice." The court also stated, "The sentence imposed in this case is based upon the facts shown to the court, the presentence investigation report, the defendant's criminal history and history of treatment opportunity, for reasons of deterrence and the reasons stated on the record." Rose appeals his sentence.

II. Standard of Review.

Our review is for correction of errors at law. *State v. Thomas,* 547 N.W.2d 223, 225 (Iowa 1996). The decision to impose a sentence within statutory limits is "cloaked with a strong presumption in its favor." *State v. Formaro,* 638 N.W.2d 720, 724 (Iowa 2002). The sentence will not be upset on appeal "unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure." *State v. Grandberry,* 619 N.W.2d 399, 401 (Iowa 2000). An abuse of discretion is found only when the sentencing court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Thomas,* 547 N.W.2d at 225. We review both the court's stated

reasons made at the sentencing hearing and its written sentencing order. *See State v. Lumadue,* 622 N.W.2d 302, 304 (Iowa 2001).

We review claims for ineffective assistance of counsel de novo. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). This is our standard because such claims have their basis in the Sixth Amendment to the United States Constitution. *State v. Clay*, 824 N.W.2d 488, 494 (Iowa 2012).

III. Discussion.

A. Sentencing.

Rose maintains the record is not adequate for us to review the district court's reasons for imposing the specific sentence. *See State v. Marti*, 290 N.W.2d 570, 589 (Iowa 1980) ("[W]hen a trial court fails to state on the record its reasons for the sentence imposed, the sentence must be vacated and the case remanded for amplification of the record and resentencing."). In the alternative, he maintains that even if the record allows review, the court abused its discretion by failing to consider testimony offered on his behalf at the sentencing hearing.

In criminal cases the court is to "state on the record its reasons for selecting the particular sentence." Iowa R. Crim. P. 2.23(3)(d). A court has provided adequate statement for our review when it "recites reasons sufficient to demonstrate the exercise of discretion and indicates those concerns which motivated the court to select the particular sentence which it imposed." *State v. Garrow*, 480 N.W.2d 256, 259-60 (Iowa 1992). Here, the district court's sentencing record contains both.

The court explained that between the two options before it, a suspended sentence or incarceration, incarceration was a better option. The court expressed concern that Rose had received leniency and treatment options before but had not yet changed his behavior. The court also noted that driving while intoxicated "puts the public in serious harm's way," and this was the sixth time Rose had been convicted of the offense.

Rose argues, even if the record allows for review, the district court abused its discretion by failing to consider testimony offered on his behalf. *See State v. Peters*, 525 N.W.2d 854, 859 (Iowa 1994) ("A court must consider any information offered by the parties relevant to the question of sentencing."). Rose offered seven witnesses at the hearing who each testified he or she believed it was in Rose's best interest to attend an in-patient rehabilitation program rather than be incarcerated.

Here, the court expressly referred to the witnesses' testimony during the oral pronouncement of the sentence, stating, "It's great that there are people here supporting him today and asking that he be given a second chance, but in fact we're way past the second chance. In the written sentencing order, the court stated, "It is impressive that that the defendant has so many friends and supporters. Unfortunately, his criminal history speaks with a louder voice." While it is clear the court was not persuaded by the testimony of Rose's witnesses, we cannot say the court failed to consider it.

We find the district court did provide adequate reasons on the record, and no abuse of discretion is shown.

B. Ineffective Assistance of Counsel.

We generally preserve ineffective-assistance-of-counsel claims for postconviction-relief proceedings. *State v. Utter*, 803 N.W.2d 647, 651 (Iowa 2011).[1] "Only in rare cases will the trial record alone be sufficient to resolve the claim on direct appeal." *State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006). We prefer to reserve such claims for development of the record and to allow trial counsel to defend against the charge. *Id.* If the record is inadequate to address the claim on direct appeal, we must preserve the claim for a postconviction-relief proceeding, regardless of the potential viability of the claim. *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010).

Here, Rose made a general request to preserve the issue of ineffective assistance for possible future postconviction-relief proceedings. We preserve the issue.

IV. Conclusion.

Because we find the district court did provide adequate reasons on the record, and no abuse of discretion is shown, we affirm Rose's conviction and preserve the issue of ineffective assistance of counsel for possible postconviction relief.

AFFIRMED.

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[1] *See also* Iowa Code § 814.7(3), which provides, "If an ineffective assistance of counsel claim is raised on direct appeal from the criminal proceedings, the court may decide the record is adequate to decide the claim or may choose to preserve the claim for determination under chapter 822."